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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

vs.

THE UNITED SATES OF AMERICA, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAY IT PLEASE THE COURT:

The petition of the Hamburg-American Line respectfully shows to this Honorable Court:

The Essential Facts.

1. This is a suit which was originally brought in the United States District Court for the Southern District of New York, under the so-called Tucker Act, 28 U. S. C. A., Sec. 4 (20), to recover from the United States Government a fine of $1,000 unlawfully assessed and collected by said Government through the Collector of Customs for the port of New York. Such suit arose out of the following facts:

2. Philip O'Reilly, an alien, native of Ireland and a clergyman by profession, who had resided in the United States continuously for a period of twenty years, was, after a temporary absence of four months, brought to the port of New York as a passenger upon one of petitioner's vessels, to resume his residence in the United States. He was at first ordered excluded by the immigration authorities as a non-quota immigrant without an immigration visa, but was unconditionally admitted to the United States as a returning alien resident, by order of the Secretary of Labor, acting under the authority of Section 13 (*b*) of the Immigration Act of 1924, 8 U. S. C. A., Sec. 213.

3. After the returning alien had been so admitted, the Collector of Customs for the port of New York, acting under orders of the Secretary of Labor, assessed and collected a fine of $1,140.00, in purported conformity with section 16 of the Immigration Act of 1924, 8 U. S. C. A., Sec. 216. Upon due protest being made, $140.00 was ordered returned to the petitioner, but $1,000 was imposed as a penalty and paid over to the said Collector of Customs.

4. Thereafter this suit was brought (R. 4) and upon motion for judgment on the pleadings (R. 20) such motion was, as to this cause of action, denied (R. 22) and judgment was entered accordingly dismissing this complaint (R. 23).

5. The Circuit Court of Appeals for the Second Circuit affirmed the decision of the district court, for reasons as set forth in an opinion by L. Hand, Circuit Judge (R. 31), which is reported in 65 Fed. 2d, at page 369 (advance sheets).

Reasons for Granting the Petition.

6. The decision below creates a direct conflict with the Circuit Court of Appeals for the Ninth Circuit, as set forth

in the case of *Rederiaktiebolaget Nordstjernen* v. *United States*, 61 Fed. 2d, 808 (generally called the "Johnson Line case" to facilitate pronunciation). In that instance the facts are substantially identical with the one now presented, involving an alien who had resided in the United States for many years and was transported to an American port as a returning alien resident returning from a temporary visit abroad, but without an immigration visa. She was at first excluded and later admitted by the Secretary of Labor precisely as in the O'Reilly case and upon the same authority. A fine of $1,000 was imposed in the same manner and the trial court dismissed the complaint, but the order of dismissal was reversed by the Circuit Court of Appeals for the Ninth Circuit in an elaborate opinion by Wilbur, Circuit Judge, cited *supra*. The Circuit Court of Appeals for the Second Circuit had before it the decision in the Johnson Line case, expressed disagreement therewith on one point (R. 32) and, after discussing the involved language of the statute and apparent uncertainty of the statutory intent, stated (R. 35) "certainty must await an authoritative ruling". This unquestionably suggests that a ruling should be sought and obtained which will be authoritative and binding in each of the respective circuits. The petitioner therefore invokes Rule 38, Section 5, of the Rules of this Honorable Court, and suggests that the conflict of decision as hereinbefore set forth is sufficient to justify the granting of this petition.

Jurisdiction.

7. The order on mandate below was entered on May 15, 1933 (R. 36).

8. Jurisdiction of this Court is provided by 28 U. S. C., Sec. 347 (*a*).

Statutes Involved.

9. The statute involved is the Immigration Act of 1924 (8 U. S. C., Sec. 145). The particular parts of that statute having a bearing upon this case are Sections 13 (*b*) (*d*) and (*f*) and Section 16 (*a*) (*b*) and (*c*), which are set forth in the appendix hereof.

Questions Presented.

10. Whether a transportation line is justified in bringing to an American port as an applicant for readmission an alien resident of the United States who is returning from a temporary visit abroad, but had no immigration visa or re-entry permit.

11. Whether, under such circumstances, if the Secretary of Labor orders the admission of such returning resident alien, pursuant to discretionary authority conferred upon him by statute, such admission relieves the transportation line from penalization for having embarked and transported such passenger without an immigration visa.

12. Whether the fine and passage money constitute one indivisible penalty and whether it is within the statutory powers of the Secretary of Labor to separate them into two parts, refunding a part to the transportation line and imposing a fine of $1,000 as a separate penalty.

13. Whether liability to a fine accrues under Section 16 of the Immigration Act of 1924 in those cases wherein discretionary power is conferred upon the Secretary of Labor to admit a returning resident alien without an immigration visa and the secretary has exercised the power by readmitting such returning resident.

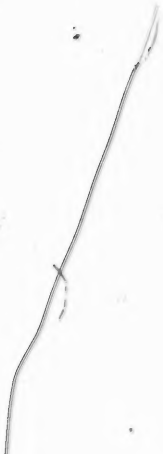
14. Whether the provisions of Section 13 (*f*) of the Immigration Act of 1924 establish any different principle

than that existing under former statutes containing substantially similar provisions for administrative fines in immigration cases.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket, No. 350, *Hamburg-American Line, Appellant,* v. *The United States of America, Respondent,* and that the said judgment of the Circuit Court of Appeals for the Second Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray.

HAMBURG-AMERICAN LINE,
By ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER,

v.

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Courts Below.

The opinion in the United States Circuit Court of Appeals for the Second Circuit is reported in *Hamburg-American Line* v. *United States,* 65 Fed. 2d, 369, and is printed in the record herein (R. 31).

The contrary opinion of the Circuit Court of Appeals for the Ninth Circuit is reported in *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 Fed. 2d, 808.

II.

Jurisdiction.

1. The order on mandate below was entered on May 15, 1933 (R. 36).

2. Jurisdiction of this Court is provided by 28 U. S. C., sec. 347 (*a*), and is supported by the action of this Honorable Court in hearing and determining the cases of *Lloyd Sabaudo Societa Anonima Per Azioni* v. *Philip Elting, Collector, etc.* (287 U. S. 329; 53 S. Ct. —; 77 L. Ed. 184), and *Philip Elting* v. *North German Lloyd* (287 U. S. 324; 53 S. Ct. 164; 77 L. Ed. 181), involving interpretation of the Immigration Act of 1924, 8 U. S. C. A. sec. 213.

III.

Statement of the Facts.

The essential facts have been set out in the petition to which this is appurtenant (*supra*, p. 1) and in the interest of brevity are not repeated at this point.

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the petitioner was subject to a fine of $1,000 for bringing back to the United States a resident alien who was found admissible and was admitted by the Secretary of Labor.

B. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the admission of the returning alien by the Secretary of Labor, as authorized by statute, had no effect upon the liability to penalty for transporting such alien.

C. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the fine and passage money, by statute made one penalty, is divisible by refunding a part and imposing a part.

D. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the fine accrued against the petitioner even if the Secretary of Labor authorized the admission of the alien regardless of his having no visa or re-entry permit.

E. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that Section 13 (*f*) of the Immigration Act of 1924 established a different principle than that existing under former statutes providing for similar fines in substantially the same language as that of Section 16 of the Immigration Act of 1924.

F. The Circuit Court of Appeals for the Second Circuit erred in finding and holding that the Secretary of Labor had not acted arbitrarily and unlawfully in imposing the fine which the petitioner seeks to recover.

G. The petition for a writ of certiorari should be granted.

V.

ARGUMENT.

Point A. The petitioner was not subject to penalization for bringing back to the United States a resident alien who was found admissible and was admitted by the Secretary of Labor.

A returning resident alien, unlike all others, is by the very terms of the statute accorded preferential rights. Under the terms of Section 4 (*b*) of the Immigration Act of 1924 he is entitled to obtain a non-quota immigration visa to establish the fact that he is not subject to the provisions of the statute limiting the number of aliens who may be admitted within any one year. Secondly, such an alien may, at his election, pursuant to the provisions of Section 10 of the Act, apply for and receive a re-entry per-

mit which is by regulation made the substantial equivalent of a non-quota visa. Thirdly, such an alien, having neither non-quota visa or re-entry permit, may invoke the discretionary power of the Secretary of Labor, which cannot be exercised unless or until the alien applicant presents himself within the jurisdiction of the Secretary, namely, at a port of entry to the United States. These statutory innovations in favor of regularly-admitted and lawfully-domiciled aliens obviously place them in a specially favored class. It ought not to follow that such a returning resident alien, if unprovided with a re-entry permit and prevented by want of time or other reasons from obtaining a non-quota visa, shall be refused passage to the United States and left stranded in a foreign land; on the contrary, Section 13 (*b*) of the Immigration Act of 1924 provides a third and sanguinary means by which he may be admitted—by the express order of the Secretary of Labor, after arrival at an American port. In the case at bar, the Secretary of Labor found as a fact that the alien Philip O'Reilly was a lawfully resident alien, returning from a temporary visit abroad, and that the discretion conferred by statute should properly be exercised by admitting him as a non-quota immigrant.

The discretion conferred by Section 13 (*b*) of the Immigration Act of 1924 is substantially no different than that conferred by the 7th proviso to Section 3 of the Immigration Act of 1917 (8 U. S. C. A., Sec. 136) which authorizes the Secretary of Labor, in his discretion, to admit aliens returning, after a temporary absence, to an unreliquished United States domicile of seven consecutive years, under such conditions as he may prescribe.

In *Dollar Line* v. *Hyde* (23 Fed. 2d, 910) an alien resident of 18 years standing, returning from a three months' visit abroad, was found upon arrival to be afflicted with leprosy and was excluded and deported because of such affliction.

The Circuit Court of Appeals for the Ninth Circuit held that the steamship line which transported the alien resident to this country was not subject to the statutory fine of $1,000 for transporting such alien, and concluded (p. 912):

> "What action the Secretary would probably take in the case of a domiciled alien afflicted with a contagious disease is an immaterial consideration; we are concerned only with the extent of his power, and not with the considerations which may weigh with him in the exercise of his discretion. It would seem to follow that if the Secretary has such power, the alien must be permitted to invoke the exercise thereof by presenting himself at a port of entry, and hence a carrier cannot be penalized for transporting him for that purpose."

If such is the rule with respect to a dangerously diseased alien, whose very presence is a dangerous thing to all with whom he may come in contact, much more should be conceded as to the justification of a common carrier in transporting to these shores an alien passenger entitled to admission at the discretion of the Secretary of Labor, and whose *prima facie* right to entry could be no better evidenced than by the possession of a scrap of paper. It should be remembered that neither the non-quota visa or re-entry permit does anything more than indicate *prima facie* that the holder is not chargeable to some alien quota; the right of any alien to admission cannot be established until such alien has appeared at a port of entry in the United States. Hence the Secretary of Labor, in exercising his discretion by admitting Philip O'Reilly as a returning alien resident, established the *prima facie* right and conclusive right of the alien to admission, at one and the same time. It is submitted that the petitioner incurred no penalty by bringing the alien within the jurisdiction of the Secretary of Labor, and that the action of the Secretary, in finding him admissible

and admitting him, merely confirmed the right which existed at the time the alien was embarked as a passenger at a European port.

Point B. The admission of the returning alien by the Secretary of Labor, as authorized by statute, affected the liability of the petitioner to penalization for transporting such alien without an immigration visa or re-entry permit.

The fundamental purpose of the fine provisions of the immigration laws is the prevention of bringing to ports of the United States excludable aliens who are actually excluded and deported, with attendant hardships.

In the earlier enactments as far back as 1903 the fine provisions of the immigration laws only applied to mentally afflicted aliens and certain diseased classes whose presence on board ships endangered the health of other passengers. In 1917 these provisions were extended to cover minor physical defects, natives of certain geographical zones, and illiterate persons. In Senate Committee Report No. 352, 64th Congress, 1st Session, the object of the fine provisions and the mischief aimed at was summed up in these words:

> "The palpable object of these provisions is to prevent the hardships and other evils which result from transportation companies selling tickets to aliens who cannot enter the United States."

In other words, the purpose of penalizing a transportation line was to prevent embarkation of *inadmissible* aliens, upon whom hardship is inflicted because of exclusion and deportation. At the same time was added the provision making the fixed amount of the fine include a sum representing the price paid for the transportation, which was to be refunded to the deported alien; the purpose of this provision was obviously to alleviate the hardships of deporta-

tion by refunding money paid by an alien ordered excluded, just as the purpose of the penalty as an entirety is to discourage the transportation of aliens who are inadmissible. The alien Philip O'Reilly, in the case at bar, was not inadmissible, as he was entitled to invoke the discretionary powers of the Secretary of Labor, which could only be exercised at the port of arrival after the fact of transportation had been concluded, and such discretion *was* exercised—not by finding him inadmissible, but as being a person legally entitled to readmission as an alien resident of the United States returning from a temporary visit abroad.

When the bill which became the Immigration Act of 1924 was reported to the House of Representatives, the Committee Report (House Report No. 350, 68th Congress, 1st Session) clearly stipulated that the measure was intended to continue the principles laid down in the then-existing law. It stated:

> "The bill preserves the basic immigration law of 1917 * * * ; provides for preliminary examinations overseas * * * carries numerous sections to lessen hardships of immigrants."

The objective thus laid down undoubtedly referred to the provisions tending to relieve the hardships of deportation after useless and fruitless trips across the ocean.

A significant fact in the case at bar is that the Secretary of Labor, while inflicting a portion ($1,000) of the penalty prescribed in the statute, refunded to the petitioner the amount of the passage money ($140), thus evidencing that the alien had been properly transported and the value of the transportation earned by the petitioner. This shows that the hardship of deportation did not occur and that the fundamental purpose of preventing such hardships had not been infringed.

Point C. The fine and passage money are by statute one indivisible penalty and cannot be divided by executive authority in refunding a part and imposing a part.

Where an alien has been admitted in the discretion of the Secretary of Labor, and passage money has been returned to the steamship company, how can it be said that a fine has accrued? The fine and passage money are inseparable. One is tied to the other.

On this proposition Judge McCormick in the unreported case of *International Mercantile Marine* v. *United States* (L. 39/283, Southern District of New York) had this to say:

> "The penalty of fine in each case consisted of $200 and the passage money. These items constituted in the law but one unified, inseparable and individual penalty. Passage money was to be used for the benefit of the alien in the event he was excluded. None of these aliens were excluded but on the contrary all were given temporary admission into the United States, and as far as the records disclose they are still lawfully within the United States."

In *Norddeutscher Lloyd* v. *United States,* 213 Fed. 10, the Circuit Court of Appeals for the Second Circuit had under consideration a provision of the former Immigration Act of 1907 (34 Stat. 898), authorizing the assessment of fines in the cases of "aliens brought to this country in violation of law"; and the court held (p. 14) that, inasmuch as it was shown that the aliens involved had been admitted by the Department officials under bond, it was impossible to take the view that such aliens had been brought to the United States "in violation of laws," and that therefore no fines could lawfully be imposed.

In *Lloyd Sabaudo* v. *Elting,* 45 Fed. (2d) 405, 409, the Circuit Court of Appeals for the Second Circuit held that the Secretary of Labor had miscontrued Section 9 of the

Immigration Act of 1917 (8 U. S. C. A., Section 145) and that the two fines involved would have to be refunded, because the aliens on whose account such fines were assessed, although they were afflicted with a loathsome contagious disease at the time of arrival, and had been allowed medical treatment under Section 22 of said Act (8 U. S. C. A., Sec. 159), and upon being cured had been admitted, pointing out that *admission did away with the evident purpose of the statute to assess fines as a preventive of the hardships of deportation,* and alluding explicitly to the manner in which Section 9 (like the section involved in the case at bar) linked absolutely together the part of the penalty consisting of an outright fine and the part consisting of passage money.

In *North German Lloyd* v. *Elting,* 48 Fed. (2nd) 547, the Circuit Court of Appeals for the Second Circuit suggests (p. 549) that:

> "If the Secretary had exercised his discretion in favor of admitting the aliens, it may be that the vessel owner who brought them would incur no penalty."

Citing the Norddeutscher and Lloyd Sabaudo cases, *supra.* And the following is taken from the latest decision of that court on this subject—*Compagnie Generale Transatlantique* v. *United States,* 51 Fed. (2d) 1053, 1055:

> "A strong reason for holding that a fine should not be imposed for bringing to the United States an alien who, though excludable under the statute, is temporarily admitted, is because the portions of the fine, namely the $200 and the return passage money, are, as Judge Patterson said in *Lloyd Sabaudo Societa* v. *Elting* (D. C.), 45 Fed. (2d) at page 409, indivisible. The carrier is required to pay the return purchase money to the collector in order to insure the alien against having to pay it and Section 9 provides that it shall be "delivered by the Collector of customs to the

alien on whose account assessed" in aid of that object. *It is impossible to suppose that a carrier is required to pay the return passage money for the benefit of an alien who is not excluded. Because the Department recognized the absurdity of such a supposition, it repaid the return purchase money deposited by the plaintiffs in this case.*

"In *North German Lloyd* v. *Elting*, 48 F. (2d) 547, where aliens liable to exclusion because of physical disability were in fact excluded, we held that a fine was properly imposed for bringing them. While we did not decide that it might not have been imposed, if the aliens had been admitted under the discretion vested in the Secretary of Labor, we cited *Lloyd Sabaudo Societa, etc.* v. *Elting* (D. C.), 45 F. (2nd) 405, and *Norddeutscher Lloyd* v. *United States* (C. C. A.), 213 Fed. 10, *in support of the conclusion that the carrier would incur no penalty under such circumstances.*" (Italics volunteered.)

It will be recalled that Section 16, like other sections of the law, indissolubly links together the provisions regarding the thousand dollar fine and those regarding passage money; and that in the case at bar, just as in that from which the above quotation is taken, the *Department recognized the absurdity of supposing that a carrier is required to pay the return passage money for the benefit of an alien who is not excluded.*

Point D. The fine against the petitioner did not accrue when the Secretary of Labor, in his discretion, authorized admission of the alien regardless of his having no immigration visa or re-entry permit.

The court below has taken in its most literal sense the language of Section 13 (*f*) of the Immigration Act of 1924, which provides:

(*f*) Nothing in this section shall authorize the remission or refunding of a fine, liability to which has *accrued* under Section 16. (Italics volunteered.)

Inasmuch as Section 13 does not authorize the imposition of any penalties, but deals exclusively in paragraphs (*a*) to (*e*) with exclusion or admission of immigrants of various classes, it is apparent that the word "accrued" must have some legal meaning. The entire sub-section (*f*) sheds no light upon itself, and we must look elsewhere for enlightenment as to when an immigration fine under Section 16 "accrues." It seems contrary to the dictates of reason to hold that the Secretary of Labor may, on the one hand, exercise statutory discretion under Section 13 (*b*) by readmission of the returning resident alien, and, on the other hand, say that he is inhibited by Section 13 (*f*) from relieving the transportation line from penalization for bringing the alien within his jurisdiction.

The word "accrued" is not used in connection with any of the fine provisions of the immigration laws and its meaning should be interpreted in the light of the general purposes of the statute and of its other provisions. (*Reading Company* v. *Koons*, 271 U. S. 58, 62; 70 L. Ed. 835, 837.) The general purpose of the statute has been set forth in detail under Point B of this brief, namely: the adoption of measures calculated to avoid the hardships of deportation by keeping inadmissible aliens from being brought to our shores. As Philip O'Reilly was found admissible and was admitted, the objective of the statute in his case was fully accomplished and no penalty "accrued." This conclusion is supported by the definition of "accrued" as "became due" (*United States* v. *Woodward*, 256 U. S. 632, 635; 65 L. Ed. 1131, 1135).

It appears inconceivable that a penalty can be said to have "accrued" at all where a discretionary right has been

favorably exercised, and Section 13 (*f*) is consistent with paragraphs (*a*), (*c*), and (*e*) of Section 13, all of which provide for exclusion, but, unless liberally construed, is in harsh conflict with the discretionary powers granted to the Secretary of Labor under paragraphs (*b*) and (*d*), at least where those powers are exercised favorably by admission of the alien.

Furthermore, an utter absurdity is created if a narrow meaning is applied to Section 13 (*f*), as it would mean that a transportation line should be penalized for bringing a returning resident alien with a re-entry permit issued under the provisions of Section 10 of the Act, and which the Secretary of Labor, in the exercise of his discretionary power, has by regulation based on Section 13 (*b*) made the equivalent of a non-quota immigration visa. As the same Section 13 (*b*) opens the way for readmission of returning resident aliens who have no visas, the existence of the absurdity is made apparent.

Point E. Section 13 (f) of the Immigration Act of 1924 does not establish a different principle than that existing under former statutes providing for similar fines in substantially the same language as that of Section 16 of the Immigration Act of 1924.

The court below (R. 34) expresses the view that its previous decisions, there cited, that the admission of an alien tolls the fine, are inapplicable here because of Section 13 (*f*), discussed in Point D, *supra*. The court says (R. 34) "That may well be true when the statute does not say otherwise, but not here." The fine provisions of the Immigration Act of 1924 in relation to passengers are all contained in Section 16, and the language thereof follows the language used in the Immigration Act of 1917 (8 U. S. C. A., Sec. 145) and that of the Quota Act of 1921-22 (42 Stat. 540) and it was invariably held that in the application of those fine provi-

sions, the admission of the alien tolled the fine. It is not to be presumed that the Secretary of Labor commits an unlawful act in the admission of the alien; hence it appears obvious that when the alien has been found admissible and has been admitted, there can have been no unlawfulness in bringing him to a place where such admission could occur. If the alien is excluded and deported, that is a different matter, as the plainly-stated object of the Act of 1924 is to alleviate the hardships of deportation and the deportee has the right to have his passage refunded, the transportation line being also liable to a fine of $1,000 for transporting an alien whose inadmissibility has been established by the Secretary of Labor, who is the final authority on that point.

A sensible construction of Section 13 (*f*) is that it forbids the Secretary of Labor to remit fines under Section 16 of the Act where the exceptions provided in paragraphs (*b*) and (*d*) have not been exercised in favor of the admission of the alien having no visa or an improper form of visa, as the case may be.

This point should be considered in its relationship to Point D, *supra*, and the authorities there cited.

Point F. The Secretary of Labor acted arbitrarily and unlawfully in imposing the fine which the petitioner seeks to recover.

While the findings of the Secretary of Labor as to the facts constituting supposed ground for penalization has been held to be final and not subject to review by the courts, the action of the Secretary is subject to judicial review to the extent of determining that he has not acted within the statutory authority conferred upon him (*Lloyd Sabaudo* v. *Elting*, 77 L. Ed., 184, 188).

In the case at bar there is no dispute as to the matters of fact, either concerning the transportation of the alien

Philip O'Reilly by the petitioner, the fact that he had no visa or re-entry permit, or the fact that he was admitted by the Secretary of Labor as a returning alien resident under the authority conferred by Section 13 (*b*) of the Immigration Act of 1924.

The gist of the proposition is that the Secretary of Labor arbitrarily held that the fine "accrued" regardless of the existence of the discretionary right to admit the alien and the exercise of such right by admitting him; also that he arbitrarily divided the penalty by imposing a part and remitting a part, while the petitioner contends that the penalty is one and indivisible; further, that the action of the Secretary of Labor in imposing the penalty amounts to penalization of the petitioner because the alien Philip O'Reilly had no re-entry permit, which is by statute (Immigration Act of 1924, sec. 10) limited to establishment that the alien holder is returning from a temporary visit abroad. Each of these propositions involves statutory construction and the petitioner contends that, as a matter of law, the Secretary of Labor misconstrued the penal provisions of the statute and inflicted a confiscatory penalty in disregard of the well-known principle that penal statutes must be strictly construed against the sovereign.

Last Point.

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROGER O'DONNELL,
Counsel for Petitioner.

WILLIAM J. PETERS,
LAMBERT O'DONNELL,
Of Counsel.

August 12, 1933.

APPENDIX.

Immigration Act of 1924, 8 U. S. C., Sec. 145.

SEC. 13. (*b*) In such class of cases and under such conditions as may be by regulations prescribed, immigrants who have been legally admitted to the United States and who depart therefrom temporarily may be admitted to the United States without being required to obtain an immigration visa.

SEC. 13. (*d*) The Secretary of Labor may admit to the United States any otherwise admissible immigrant not admissible under classes (2) or (3) of subd. (*a*) of this section if satisfied that such inadmissibility was not known to and could not have been ascertained by the exercise of reasonable diligence by such immigrant prior to the departure of the vessel from the last port outside of the United States

* * *.

SEC. 13. (*f*) Nothing in this section shall authorize the remission or refund of a fine liability to which has accrued under Section 16.

SEC. 16. (*a*) It shall be unlawful for any person, including any transportation company, or the owner, master, agent, charterer, or consignee of any vessel, to bring to the United States by water from any place outside thereof (other than foreign contiguous territory) (1) any immigrant who does not have an unexpired immigration visa, or (2) any quota immigrant having an immigration visa the visa in which specifies him as a non-quota immigrant.

(*b*) If it appears to the satisfaction of the Secretary of Labor that any immigrant has been so brought, such person or transportation company, or the master, agent, owner, charterer, or consignee of any such vessel, shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $1,000 for each immigrant so brought, and in addition a sum equal to that paid by such immigrant for his transportation from the initial point of departure, indicated in his ticket, to the port of

arrival, such latter sum to be delivered by the collector of customs to the immigrant on whose account assessed. No vessel shall be granted clearance pending the determination of the liability to the payment of such sums, or while such sums remain unpaid, except that clearance may be granted prior to the determination of such question upon the deposit of an amount sufficient to cover such sums, or of a bond with sufficient surety to secure the payment thereof approved by the collector of customs.

(*c*) Such sums shall not be remitted or refunded, unless it appears to the satisfaction of the Secretary of Labor that such person, and the owner, master, agent, charterer and consignee of the vessel, prior to the departure of the vessel from the last port outside the United States, did not know, and could not have ascertained by the exercise of reasonable diligence (1) that the individual transported was an immigrant, if the fine was imposed for bringing an immigrant without an unexpired immigration visa, or (2) that the individual transported was a quota immigrant, if the fine was imposed for bringing a quota immigrant the visa in whose immigration visa specified him as being a nonquota immigrant.

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 343

HAMBURG-AMERICAN LINE, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

The decision of the court below appears to be in direct conflict with the decision of the Circuit Court of Appeals for the Ninth Circuit in *Rederiaktiebolaget Nordstjernen* v. *United States,* 61 F. (2d) 808, where a contrary result was reached on substantially identical facts. While we regard the decision below as correct, we submit that the conflict calls for an authoritative ruling by this Court, and consequently we do not oppose the granting of the writ.

J. CRAWFORD BIGGS,
Solicitor General.

9072—33

U. S. GOVERNMENT PRINTING OFFICE: 1933